

# Water Quality Standards (WQS)



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Environmental Quality

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# Today's Agenda

- ✓ The Clean Water Act (CWA)
- ✓ State Law & DEQ Authority
- ✓ Rulemaking & EPA Oversight
- ✓ Idaho WQS (The Results)

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- Scope of what we are covering today
- Because WQS (rules) have the “force and effect of law”, we need to first understand their purpose, their legal basis.
- I am going to start by out by looking at the Federal Clean Water Act and with some unavoidable reference to Idaho
- Then Cyndi will briefly turn to Idaho law and the authorities that DEQ has been given, and how that fits into a federal-state partnership set up by the CWA.
- Then we will have short break (10 min)
- After that, Cyndi is we are going to examine the process in Idaho for getting WQS into rule, and EPA’s oversight role
- Finally I will get into he major components of Idaho’s WQS, but not a lot of detail. The results of a DEQ/EPA partnership.



DEQ

Idaho  
Statute: Title  
39 Health and  
Safety,  
Chapter 36  
Water  
Quality

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Now lets turn to State Law and authority

# Idaho Water Quality Statute 39-3601 et seq.

- Identifies and gives DEQ authority to administer and implement WQS approved by the Legislature
- Meet the goals and requirements of the CWA



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This is the State counterpart to the CWA, it gives DEQ – us – the authority to carry out clean water programs specifically ... (see slide text)

**[Handout copy of 39-3601 et seq.]**

## Some Important Sections

- ✓ Maintain existing water quality (39-3603)
- ✓ Designate uses that a waterbody can support (39-3604)
- ✓ Define reference streams - use them for assessing use support (39-3605 & 6)
- ✓ Identify impaired waters and set priority for restoration (36-3909)
- ✓ Develop TMDLs and monitor progress (39-3611)
- ✓ Stakeholder involvement through advisory groups (39-3613 to 3616)

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Much of the Idaho water Quality Law parallels or mimicks Federal statute.

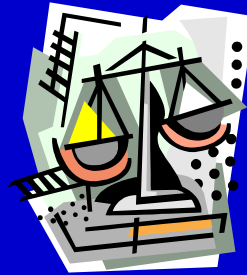
But there are parts that go beyond the CWA, such as incorporating as law in Idaho details that are only regulation on the Federal level, e.g. antidegradation, details on TMDLs.

Then there is the mention of reference streams, in law. This is unique ... and is the foundation for DEQ's bio-assessment program.

## Stringency Requirement (39-3601)

- Idaho water quality rules are not to impose requirements beyond those of the CWA:

"It is the intent of the Legislature that the State of Idaho fully meet the goals and requirements of the federal CWA and that the rules promulgated under this act not impose requirements beyond those of the federal CWA."



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This links us to the federal CWA, but we can never go beyond it. We get special treatment. This has many repercussions for our rules aka WQ standards.

This also reinforced by IC 39-107(d) – Which applies only to DEQ. From the early days when DHW first given authority to implement CWA

### [Handout – Copy of IC 39-107(D)]

There have been recent legislative attempts to tighten down our rulemaking authority even more, e.g. requiring scientific and economic impact analysis report before proposing any rule (HB51 in 2003).

## Advisory Groups (39-3613 through 39-3616)



- Basin Advisory Groups (39-3613 & 3614)
  - BAGs are mandatory and provide advice to DEQ 's Director
- Watershed Advisory Groups (39-3615 & 3616)
  - WAGs are ad hoc and mainly advise DEQ on pollution control measures in the context of TMDL development and implementation

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BAGs and WAGs are something Idaho has that maybe is not unique, but certainly unusual (at least in being brought about by law) and certainly beyond Federal requirements

By mandatory we the law specifies at least six BAGs – Panhandle, Clearwater, Salmon, Southwest, Upper Snake, and Bear – that combined cover every bit of the state.

Representation on the BAGs is also specified by law, e.g. 1) agriculture, 2) mining, 3) industrial point source discharge permittees, 4) forest products, 5) local government, 6) livestock, 7) Indian tribes (for areas within reservation boundaries), 8) water-based recreation, and 9) environmental interests, and at large.

# Biomonitoring

Foundation is in Idaho Statute (39-3605 through 3607):

- Beneficial Use Reconnaissance Program
- Water Body Assessment Guidance



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- ✓ Law calls for identifying reference streams and then using them for assessing use support (39-3605, 6, & 7)
- ✓ Biomonitoring is one of Idaho's real strengths. Where we get national recognition. And, as we said earlier, best way to evaluate / assess narrative criteria such as sediment and nutrients.
- ✓ Bioassessment does run up against EPA's Independent Applicability Policy. [Handout] IA basically says when evaluating multiple types of data (chemical, biological, toxicological) if ANY ONE shows a problem you should presume an adverse impact



## No Net Increase (39-3610)

- Rules in section 054 are based on IC 39-3610, but neither the law nor the rules use the words “no net increase”
- No net increase depends on priority of impaired waters
- Idea in policy is to hold the line on pollutant loads

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Another cased on an inverted pyramid of law, rule, & policy.

39-3610 speaks to general limitations on point and nonpoint sources for water bodies not fully supporting beneficial use in the interim prior to development of a TMDL

It requires TMDLs for high priority waters and prohibits “further impairment” of low and medium priority waters. The rules echo this.

The draft policy (available on DEQ’s web) expresses the idea of holding the line on pollutant loads.

DEQ took a shot at crafting regulation to implement the law in a way that made most sense, and from that policy and guidance followed. However, there are some who contend we are off base on our interpretation, that we invented “No net increase”. Difficult for DEQ given the few words in the statute that we had to go on. Remember the inverted pyramid we showed you earlier?

Regarding priorities, there is an assertion by people that crafted 39-3601 et seq. that waterbody priorities were fixed at the time of passage of the law and therefore we no longer have any high priority waters in Idaho! That may be so, but would be inconsistent with federal regulations.

## Idaho Lacks NPDES Primacy

- EPA currently issues NPDES permits for Idaho dischargers
- Idaho's lack of primacy is unusual (one of only five states without any NPDES authority)
- Idaho is pursuing primacy so this may change

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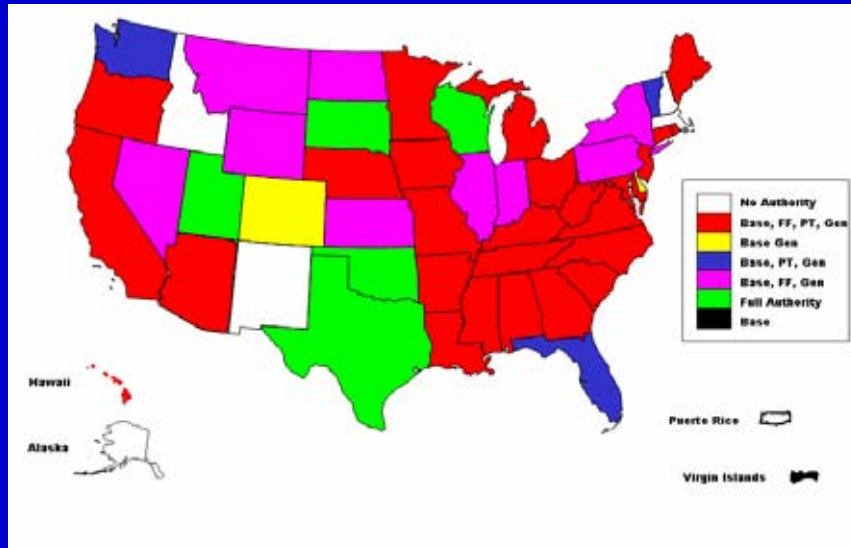
Many dischargers would rather work with the state than EPA, but not sure they want to pay for a 'service' they now get for free.

The big guys are generally in favor of it because it would alter ESA consultation, would not happen unless EPA stepped in and said permit was inadequate

401 certification would go away (for NPDES) but a much bigger workload would be inherited.

Cost is a big issue for DEQ, and so is expertise!

## State NPDES Program Authority



- This is as of April 2004.
- Five states, including Idaho have no NPDES authority, EPA writes all discharge permits
- But only five states have assumed full authority

PT = pretreatment

FF = federal facilities

Gen = general permits

Full authority assumes responsibility for permitting basic municipal and industrial discharges, pretreatment, federal facilities, general permits, bio-solids, and stormwater (including CSOs)

## Legislative Review of Rules (39-3623)

- Every rule promulgated ... shall be of **temporary effect** and shall become **permanent only by enactment of statute** at the first regular session following adoption of the rule
- Also in I AC 67-5224, Idaho Administrative Procedures Act, ... "a pending rule shall become **final and effective upon conclusion of the legislative session** on which the rule was submitted to the legislature for review"

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This is another way in which Idaho is special, it definitely lengthens the rulemaking process

No other state in the region has this... only became this way in Idaho in 1996, and it is very unlikely that the legislature will relinquish control now that they have it.

Most state agencies don't do this (constitutionalists would argue it violates separation of powers). Idaho walks a fine line by calling this legislative review, i.e. legislature does not have power to write rules or edit those it reviews.

## Summary: What Sets Idaho Apart

- ✓ Stringency Requirement
- ✓ Basin and Watershed Advisory Groups
- ✓ Biomonitoring
- ✓ No Net Increase
- ✓ Lack of NPDES Primacy
- ✓ Legislative Review of Rules

## Scope of WQS Training



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Now lets turn to the meeting in the middle of state and federal authorities and ... take a look at what the result is.

# Meeting in the Middle



## Agenda

1. Partnership Flowchart
2. WQS Submission and Review
3. Timeline for WQS Development/Review
4. "Alaska Rule"
5. ESA Consultation
6. Triennial Review

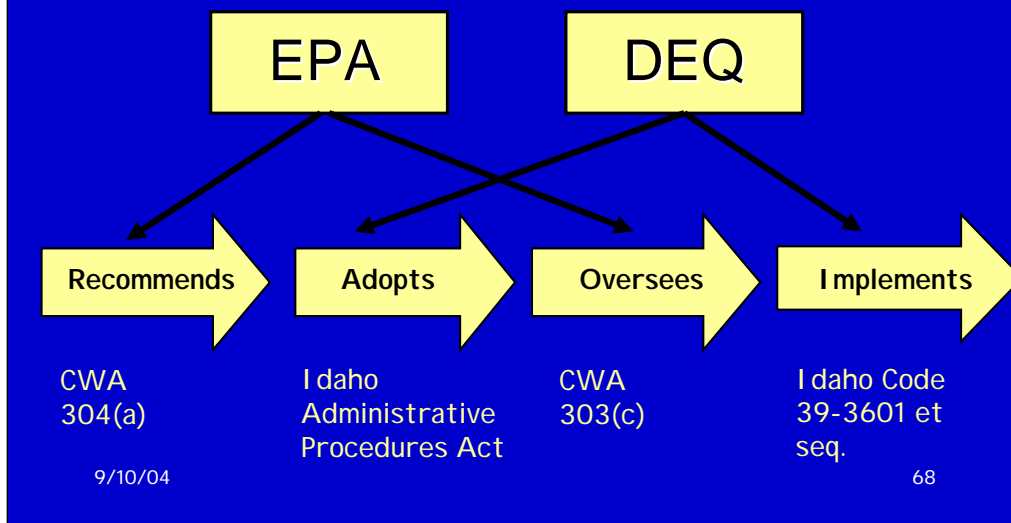
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There are actually many aspects to the DEQ / EPA partnership, you have may have heard of the Performance Partnership Agreement we work out in late spring of each year.

We are going to touch only on the WQS aspects of the partnership.

## The EPA/DEQ WQS Partnership Flowchart

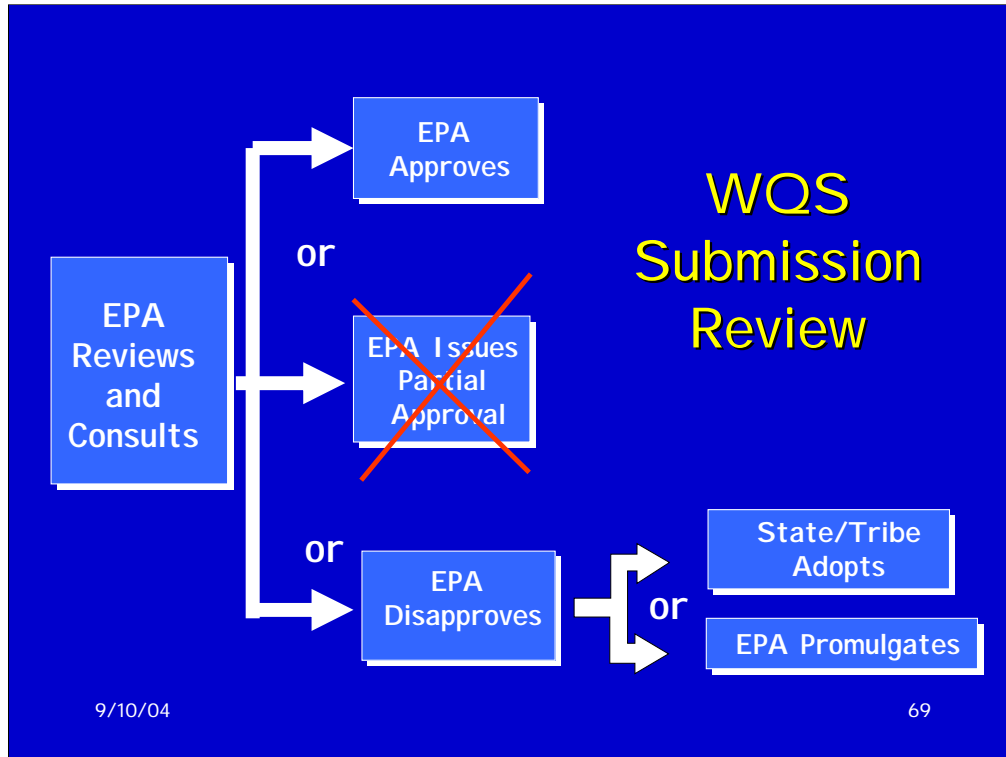


This is how the partnership for WQS is set up.

1. EPA develops criteria guidance documents as called for by section 304(a) of the CWA.
2. The state takes these under advisement, but generally just adopts EPA's recommendations (difficult to do otherwise with stringency requirements and little resources)
3. EPA reviews state adoptions, approves or disapproves. Generally more review, deliberation over optional elements of WQS.
4. Then it is up to DEQ to implement the WQS.

EPA can promulgate Federal rules specific to a state or group of states (e.g. NTR, Idaho Bull trout temperature), but in general there are not enforceable WQS in Federal rules, mostly only in State or Tribal rules.





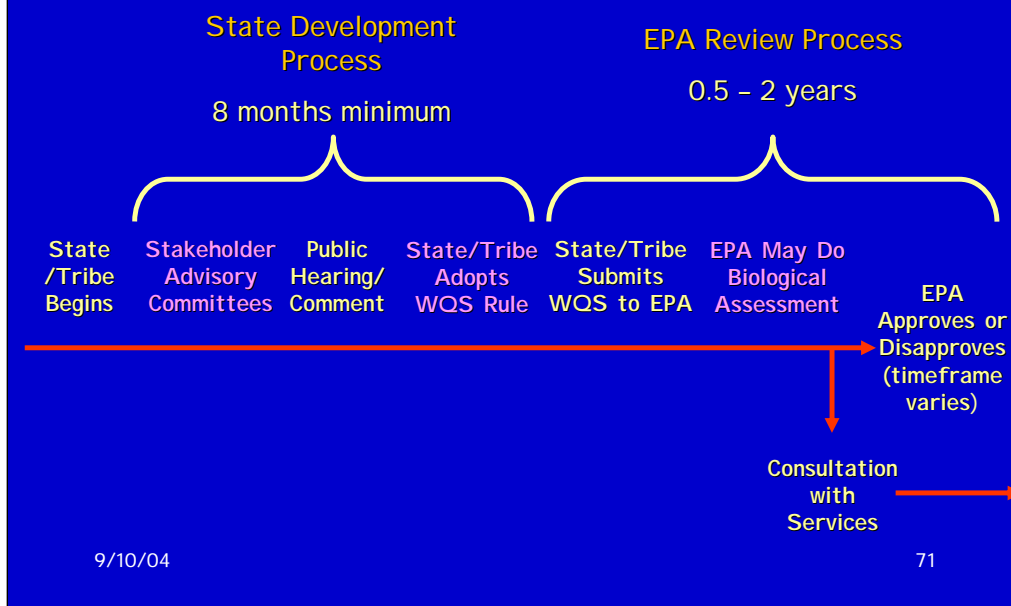
- When a State/Indian Tribe revises or adopts a new WQS, it must be submitted to the EPA Administrator for approval. (CWA Section 303(c)(2)(A)).
- This is delegated in rule to the regional administrator, and in region 10 is further delegated to the Director of Office of Water
- By statute EPA has 60 days to approve a state's WQ submission or 90 days to disapprove.
- If they disapprove, they must specify the changes needed to make submission appropriate.
- If state does not adopt changes specified within 90 days of notification of disapproval, the EPA administration "shall promptly propose and promulgate the standard"

## Contents of WQS Submittal

### 40 CFR 131.6

- Methods and analyses used
- Water quality **criteria** sufficient to protect uses
- **Use** designations consistent with the Clean Water Act
- **Antidegradation** Policy and implementation procedures
- Information to support uses not specified in section 101(a)(2) of the Clean Water Act
- General state policies affecting application and implementation
- Attorney general certification or tribal legal authority

## Timeline for WQS Development/Review



This is a more detailed, yet simplified, overview of entire process, both state and federal side. (do not go into detail on state process, that comes later)

Process has many steps, and can take several years, even a speedy rulemaking in Idaho takes at least 8 months, for an agency w/o a Board, DEQ's process is more like a year, and this is not counting coming up with rule language.

Then our WQS go to EPA for review, which has rarely taken less than a, year, is most typically a couple years, and in the case of Idaho's 1994 toxics criteria is still ongoing due to ESA consultation

## Timeline for WQS Development/Review

"Alaska Rule" amended  
40 CFR 131.21

After May 30, 2000 state  
adopted WQS not  
effective for CWA  
purposes until EPA  
approves them



More  
Consultation  
with  
Services

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EPA  
Approves  
Modified  
Action

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And years!

This was of no real matter to Idaho until a court decision over rules adopted by the State of Alaska that were pending EPA action.

This case resulted in the so called "Alaska Rule", now a section of the CFR. As of May 30, 2000 state adopted rules are not effective for CWA purposes until EPA says so, which in Idaho generally means until after consultation.

This puts many newer rules adopted by the Idaho in limbo.

## ESA Consultation

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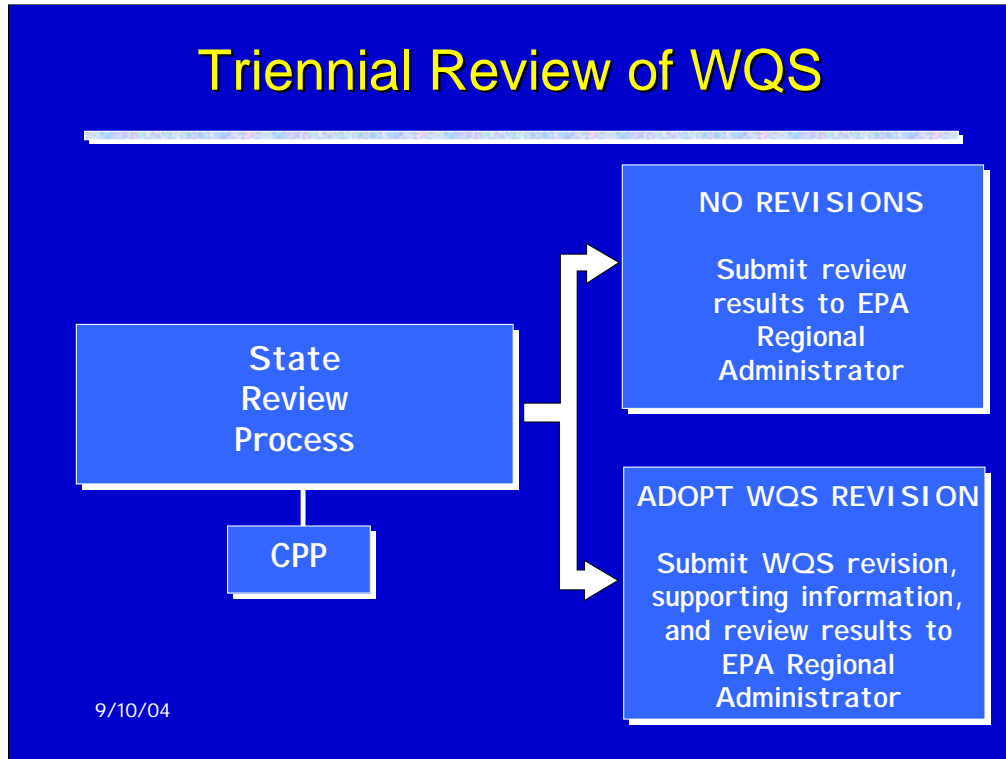
- Consultation is between EPA and the Services (NOAA Fisheries & Fish and Wildlife Service)
- Consultation is triggered by a federal action
- EPA approval of WQS is a federal action
- Two stages of consultation:
  - Informal: optional, EPA prepares biological assessment, determine if may affect adversely
  - Formal: Services prepare biological opinion, determine jeopardy/no jeopardy

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So what is this consultation business?

Federal actions are subject to review, called a consultation, to assure they are consistent with the purposes of the ESA. The federal action in the case of WQS is EPA approval or disapproval, and so consultation is between EPA and the services



- States are directed by Federal rules to review their WQS from time to time but at least once every 3 years.
- These rules also say we are to hold public hearings for the purpose of this review.
- And that our review procedures should be incorporated in the Continuing Planning Process (whatever that is).

DEQ has not exactly done this since we last time submitted our whole rule chapter to EPA in 1994, since then the state's rulemaking procedures were made more cumbersome in 1996.

Idaho DEQ maintains that our ongoing update of our WQS fulfills triennial review requirements. Some in EPA accept this, others do not. It is probably destined for litigation to determine who is right.